STATE OF CALIFORNIA — Arnold Schwarzenegger, *Governor*
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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April 26, 2006

Robert R. Roginson, Esq.
Atkinson, Andelson, Loya, Ruud & Romo
17871 Park Plaza Drive, Suite 200
Cerritos, CA 90703-8597

Re: Public Works Case No. 2005-031
Clubhouse Improvements
Palos Verdes Golf Course and Country Club

Dear Mr. Roginson:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the Palos Verdes Golf Club's Clubhouse Improvements ("Project") is not a public work subject to the payment of prevailing wages.

The City of Palos Verdes Estates ("City") owns real property known as the Palos Verdes Golf Course and Country Club. City leases this real property to the Palos Verdes Golf Club, Inc., a private, non-profit corporation ("Club"), through a long-term concession agreement, extending from 1993 through 2024 ("Agreement"). Under this Agreement, Club is required to maintain and operate the Palos Verdes Golf Course and Country Club, and to pay City a concession fee of 10 percent of its gross receipts, as defined in the Agreement. The Agreement also requires that 10 percent of members' dues, 10 percent of gross receipts and certain surplus revenues be deposited into a Club Improvement Fund, to be used only for major capital improvements and other specified purposes. Subject to certain conditions, Club may call for direct capital contributions from its members if needed for improvements that require more capital than available through the Club Improvement Fund.[1]

Club is required to pay for all improvements through its revenues and Club Improvement Fund, including "all costs incurred by the

[1]The basic terms of the Agreement, including the amount of the concession fee, were established in the original iteration of the current agreement that the parties entered into in 1993. The parties subsequently agreed to term extensions and other minor modifications pertaining to the Club Improvement Fund and residency requirements. For the sake of clarity and convenience, the parties then restated the entire Agreement in 2002. The 1993 Agreement itself refers to prior agreements between the parties going back to 1969.

City for inspection of such improvements." City approves the Club's budget, including requests for major capital expenditures, as well as proposed member fees and assessments. City provides no financial support to Club either directly or as a guarantor for Club expenditures. However, under the Agreement, City "agrees to waive any application fees otherwise required for processing of conditional use permits, variances, or other discretionary approvals required for such improvements." City remains the sole owner of the land and facilities, including all improvements developed by Club.

Project in this case is a major reconstruction of the clubhouse at the Palos Verdes Golf Course and Country Club. Club has entered into a prime construction contract with a private firm to do the actual construction work for a total of $7,654,687. Club will also spend approximately $2,500,000 for related costs, including site preparation, temporary utilities, architect and engineering fees, insurance and construction management. Because the Club Improvement Fund did not have adequate funds for Project, Club raised an additional $10,000,000 through a special assessment on its membership. City approved the assessment but is not providing any funding for Project nor is it a guarantor of Club's obligations. As provided under the Agreement, City has waived fees totaling $3,276 in connection with Project.[2] However, Club has agreed to relinquish its right to the waiver and pay those fees, and City has agreed to accept the payment so that there will be no monetary contribution by City to Project.

Labor Code section 1720(a)(1)[3] generally defines public work to mean "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds … ."

Section 1720(b),[4] in relevant part, defines "paid for in whole or in part out of public funds" as including:

> Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value,

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[2]These fees are $743 for a Grading Application, $1,114 for a Conditional Use Permit, $1,119 for an Environmental Study and $300 for a Radius Map.

[3] All further section references are to the Labor Code.

[4] Subsection (b) was added to section 1720 by Statutes 2001, chapter 938 (Sen. Bill No. 975), which became effective on January 1, 2002. This subsection was divided into subparts by Statutes 2002, chapter 220 (Sen. Bill No. 972), which became effective on January 1, 2003.

waived, or forgiven by the ... political subdivision." (Section 1720(b)(4).)

There is no question that this Project involves "construction" that will be "done under contract." The issue presented is whether it is being "paid for in whole or in part out of public funds." Waiver of the various fees listed in note 2 above, which were incurred when Club undertook this Project, would be a payment of public funds under section 1720(b)(4), *supra*. However, the parties have agreed that Club will pay these fees, thus eliminating this source of "public funds."

The only other potential source of public funds for this Project would involve the concession fees paid by Club. Under section 1720(b)(4), fees or rents "charged at less than fair market value" would be a payment of public funds. In this matter the Agreement setting forth the amount of the concession fee was entered into in 1993, prior to enactment of section 1720(b)(4) adding below-market rent to the definition of payment of public funds. While there is no evidence suggesting that the concession fee here is for less than fair market value, even if it were, it would not constitute a payment of public funds under the applicable law. The determination herein is consistent with PW 2004-024, *New Mitsubishi Auto Dealership, Victorville Redevelopment Agency* (March 18, 2005) in which the Director found that the below-market rent charged to the Developer under a 2001 incubator lease, entered into almost one year prior to the development agreement, did not constitute public funds under the (pre-Senate Bill No. 975) version of section 1720 in effect when that lease was executed. (*Id.* at p. 3, *citing McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576.)

Accordingly, there will be no payment of public funds and Project is therefore not a public work subject to the payment of prevailing wages.

I hope this letter satisfactorily answers your inquiry.

Sincerely,

John M. Rea
Acting Director